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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A Corporation,
Respondent and Appellee Below

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT

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INDEX

SUBJECT INDEX

Opinion of the Court below	1
Statement of the Case	2
Summary of the Argument	7
The Argument	8
Conclusion	19
Certificate of Service	21

TABLE OF CASES CITED

Brady v. Southern Railway Co., 320 U.S. 476; 88 L. ed. 239	9
Burnett v. Northern Pacific Railway (Mont.), 124 Pac. 2d 307	15
Deere v. Southern Pacific Co., 123 F. 2d 438	14
Eckenrode v. Pennsylvania Railroad Company, 164 Fed. (2d) 996; 93 L. ed. 64	9, 10, 19
Ellis v. Union Pacific Railroad Co., 329 U.S. 649; 91 L. ed. 572	8, 12, 13
Galloway v. United States, 319 U.S. 372; 87 L. ed. 1458	9, 10, 17
Minneapolis & St. Louis Railroad Company v. Bombolis, 241 U.S. 211; 60 L. ed. 961	9
Mobile Power & Light Co. v. Therrell, 205 Ala. 553; 88 So. 677	12
Myers v. Reading Company, 331 U.S. 477; 91 L. ed. 1615	19
Tennant v. Peoria & Peking Union Railroad Co., 321 U. S. 29; 88 L. ed. 520	8
Trust Company of Chicago v. Erie Railroad Company, 165 F. 2d 806	17
Union Pacific v. Hadley, 246 U.S. 330; 62 L. ed. 751; 38 S. Ct. 318	17
Wolfe v. Henwood, 102 F. 2d 998 (1001)	19

STATUTES CITED

45 U.S.C.A. Sec. 51	2
Constitution of the United States, Amendment VII	9

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported in 36 So. 2d 102 (Adv. op.) and is set out in the record herein (R-22).

STATEMENT OF THE CASE

This proceeding challenges the soundness of the judgment (R-28, 29) and opinion (R-22 to 28, inc.) of the Supreme Court of Alabama in affirming the judgment of the trial court (R-20-21) which sustained apt demurrers to the Petitioner's Complaint in her suit under the provisions of the Federal Employers Liability Act (Title 45 U.S.C.A. Sec. 51) for the alleged death of her intestate. The complaint here presented consisted of three counts, numbered Ten, Eleven and Twelve. There is no question concerning the sufficiency of the allegations of the complaint that the Petitioner's intestate was an employee of the Respondent and that his employment was in interstate commerce at the time of his death. Since the Petitioner elected not to frame her Complaint so as to charge culpable negligence in permissive general terms, in keeping with general practice, but deliberately chose to allege the particular facts in as full detail as the available evidence would support (Petitioner's Petition and Brief, p. 11 and 17) we believe it appropriate to set out these essential allegations as made.

Count Ten of the Complaint (R-2 to 5, inc.) undertook to predicate liability upon the following particular allegations relative to the place of work furnished the deceased (R-3 to 5, inc.):

> "***the defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to work, in that the defendant or agents, servants or employees of the defendant, while acting within the line and scope of their employment by the defendant, negligently allowed tall canes to grow and remain in very close proximity to the railroad track over which the defendant's said freight train was being operated and upon which the said Hury O. Reynolds was riding in the performance of his duties for the defendant at said time and place, and the plaintiff avers that said railroad train

of the defendant consisted of the engine and tender, approximately sixteen (16) freight cars and the caboose of which the ten (10) cars immediately in the rear of the engine and tender were to be detached from the train and placed upon a side track at Lake Harbor, Florida and that the said Hury O. Reynolds in and about said switching operations was required to act and did begin to act as the socalled footboard brakeman and as such brakeman, shortly before arriving at the point where he was injured and killed, he had taken his position on the lead end of the sixth (6th car) from the caboose where it was intended to uncouple said train and thereafter place the several cars ahead of the car upon which the said Hury O. Reynolds was riding at said time and place upon said side track as aforesaid and upon nearing the switch leading into said side track, where said ten (10) cars were to be spotted, the said Hury O. Reynolds was required to pass a signal to the engineer so as to inform the engineer as to the point where said train should be stopped to be uncoupled as aforesaid and in order to pass said signal to the engineer so that said signal would be visible to the engineer, the said Hury O. Reynolds was required to give said signal while suspended from engineer's side of said moving train, and the plaintiff avers that if the defendant had not negligently failed to provide the said Reynolds with a reasonably safe place to work as aforesaid, the said Reynolds would have descended the engineer's side of the gondola car upon which the said Reynolds was then and there riding and would have given said signal to the engineer from the side of said gondola car, but because of the close proximity of said tall canes to the railroad track at said time and place, his said signal to the engineer, if given from the side of the gondola car, would not have been visible to the engineer and because of the danger of being struck and scraped off the side of said gondola car by said tall canes while suspended from the side of said gondola car as said gondola car passed the place where said tall canes were then and there growing, the said Reynolds was caused to cross over the front end of said gondola car in order to climb aboard

a tank car immediately in front of said gondola car as from the side of said tank car he would be above the top of said tall canes so that said canes would not strike him as the moving train passed said canes and as he could give said signal from the side of said tank car which would be visible to the engineer, and the plaintiff avers that in having to cross from said gondola car to said tank car in order both to avoid being struck by the tall canes and to give a signal visible to the engineer as aforesaid, the said Reynolds was thereby caused to place himself in a place of much greater danger than he otherwise would have been required to do in the performance of his duties at said time and place, had the defendant not negligently failed to provide him with a reasonably safe place to work in negligently allowing said tall canes to be and remain in close proximity to said railroad track at said place. And the plaintiff avers that while the said Reynolds was in said place of much greater danger as aforesaid and between the gondola car and said tank car of said moving train he fell from said train and was run over by said train and was injured so that he died."

There are otherwise no averments of facts undertaking to show that the place at which the deceased was performing his duties in going from one car to the other was not a reasonably safe place to accomplish the duties in which he was engaged, nor that he was ordered or directed to pursue that course, nor any averment showing how or why the deceased fell from the car while allegedly undertaking to proceed to the next car ahead.

Count Eleven of the Complaint (R-5 to 7, inc.) undertook to predicate liability upon the following particular allegations relative to the fellow employee of the deceased (R-6):

"***the defendant negligently failed to provide an adequate number of competent fellow servants to work with the said Reynolds in the performance of the duties

required of him and his fellow servants at said time and place in this, that the defendant furnished as a brakeman to work with Reynolds on said train at said time and place one W. E. Skelly who the plaintiff avers was incompetent and unskilled as a railroad brakeman and who had he been a competent and skilled railroad brakeman at said time and place would have been required, in the performance of his duties with the defendant, as the train upon which the said Reynolds and the said Skelly were then and there riding neared the switch at the junction of the main line of the Florida-East Coast Railroad Company with the Florida-East Coast exchange track located at Lake Harbor, to give a signal which would be visible to the engineer at the head of said train so as to inform the engineer as to the point where said train should be stopped preparatory to engaging in a switching movement and the plaintiff avers that because the said Skelly was incompetent and incapable of performing his said required duties as a railroad brakeman at said time and place the said Reynolds as the only other brakeman on said train at said time and place was required to undertake the performance of the duties of the said Skelly as a railroad brakeman at said time and place the said Reynolds being thereby caused to quit a much safer place of work and the performance of much safer duties which were assumed by the conductor on said train and the plaintiff avers that while the said Reynolds was engaged in the performance of the duties of the said Skelly and the conductor was engaged in the performance of the duties of the said Reynolds and while the said Skelly was standing idly by and not engaged in the performance of any duties whatsoever, the said Reynolds fell between two cars of said moving train and was run over by said train and was injured so that he died on said date.***"

There are otherwise no allegations in the count undertaking to show that the Respondent negligently failed in any way to furnish either the deceased or his alleged fellow employee Skelly a reasonably safe place to work, nor that any unskilled act of Skelly caused the deceased to fall, nor how

Skelly's alleged incompetence caused or proximately contributed to the fall.

Count Twelve (R-7 to 10 inc.) merely combines the averments of the foregoing Counts Ten and Eleven. In short, it alleges that one of the members of the crew was allegedly incompetent and performed no duties and that the deceased, in undertaking to perform the duties of the other crewman, left a "much safer place of work" and the performance of "much safer duties"; that because of the alleged growth of tall canes in close proximity to the railroad track (a track of the Florida East Coast Railroad Company on which the Respondent's train was at the time operating (R-6)) the deceased allegedly could not effectively signal the engineer from the side of the gondola car and therefore adopted an alternate method of performing his alleged duty, to signal the engineer, by proceeding to the tank car next ahead of the gondola car; and then simply that in the course of so moving to the car next ahead the deceased fell from the train. There are no other averments therein of facts concerning how the deceased fell from the train nor that the alternate place or route he chose to perform his duties was not a reasonably safe place or method.

The Respondent's demurrers (R-10 to 20, inc.) challenge the sufficiency of the essential averments of each of the Counts to show the existence of negligence on the part of Respondent or the actual breach of any legal duty owed the deceased (Grounds 1 to 3, 10, 12 to 14, 19, 21, 22, 32, 34, 35, 36, 38 to 41, 44, 46 to 55, 57 to 77, 79 to 81) and also as failing to show any such negligence as the proximate cause, in whole or in part, of the death of the deceased (Grounds 4, 5, 7, 11, 23 to 30, 32 to 35, 38 to 42, 44, 45, 55, 56, 62 to 65, 68, 69).

THE ARGUMENT

SUMMARY OF THE ARGUMENT

1. In asserting a claim for recovery under the Federal Employers' Liability Act the plaintiff must allege and establish probative facts which reasonably show that the defendant was negligent *and* that that negligence was the proximate cause, in whole or in part, of the accident.

2. When the essential facts are undisputed or, if disputed, when the evidence is concluded, whether the probative facts and reasonable inferences therefrom meet the tests of liability is a question of law to be resolved by the court before there is anything to be submitted to a jury.

3. Inferences, whether relating to breach of duty or proximate causation, may not be built upon inferences but only upon facts; and mere speculation will not be allowed to do duty for the essential probative facts.

4. Since the Congress has not yet required the railroad industry to bear the financial burden of every accident the courts will honestly apply the prescribed negligence test and not pretend there is negligence when it does not exist.

ARGUMENT

The issues here involve the legal sufficiency of allegations of the Complaint—not whether conflicting evidence was sufficient to warrant submission to a jury or to support a verdict of a jury in favor of the Petitioner if so submitted.

Here Petitioner has deliberately chosen to aver in detail all the facts that the available evidence can show (Petitioner's Brief, p. 11 and 17).

Whether these facts, if proven, are of themselves sufficient to establish a prima facie right of recovery under the Federal Employer's Liability Act (Title 45, U.S.C.A. Sec. 51) must be determined by application of the principles of the common law. The Act of Congress does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 649; 91 L. ed. 572.

In order to recover in this case it is necessary that Petitioner allege and prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. The essential test is as stated in *Tennant v. Peoria & Pekin Union Railroad Co.*, 321 U.S. 29, 88 L. ed. 520:

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

It is elemental that, in the essential matter of causation, the alleged negligence of the carrier must be a link in an un-

broken chain of reasonably foreseeable events. *Brady v. Southern Railway Co.*, 320 U.S. 476; 88 L. ed. 239.

When the essential facts are undisputed, whether they meet this test is a question of law, to be resolved by the court. Traditionally it is the function of the court, not the jury, to determine the legal sufficiency of the required allegations of facts in pleadings and to determine, after the evidence is concluded, whether the probative facts and the reasonable inferences therefrom meet the tests required. *Galloway v. United States*, 319 U.S. 372; 87 L. ed. 1458; *Eckenrode v. Pennsylvania Railroad Company*, 164 F. 2d. 996; affirmed U.S. ; 93 L. ed. 64 (Adv. Op. Nov. 15, 1948). Trial of such cases is not by jury alone but by the Court and the jury and the manner and procedure of trial is in good part determined by the law of the forum. This is aptly illustrated by the opinion in *Brady v. Southern Railroad Co.*, 326 U.S. 476; 88 L. ed. 239, in this language:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceedings by Non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

This long established procedure was followed by the trial court in applying the foregoing clear doctrines many times affirmed by this Court. The decisions cited by Petitioner establish no principles to the contrary. There is no requirement in the Federal Employer's Liability Act or the 7th Amendment to the Constitution of the United States that Petitioner is entitled to have a jury pass upon her claim simply because she filed a suit. *Minneapolis & St. Louis Railroad Company v. Bombolis*, 241 U.S. 211; 60 L. ed. 961;

Galloway v. United States, supra; Eckenrode v. Pennsylvania Railroad, supra. The essential probative facts adduced must first measure up to the required standards.

The Supreme Court of Alabama applied these standards as they have been declared by this Court.

THE PARTICULAR COUNTS OF THE COMPLAINT

Applying these fundamental principles to the particular counts of the Complaint it is readily apparent that they are all insufficient to show a right of recovery on the part of Petitioner.

Count Ten (R-2 to 5, inc.):

By way of inducement this Count charges the Respondent with allowing tall canes to "grow and remain in very close proximity" to the track on which the train was running. In Count Eleven (R. 5 to 7, inc.) this track is alleged to be that of the Florida East Coast Railroad Company, not the track or property of the Respondent Atlantic Coast Line Railroad Company. Since it is not claimed that the deceased fell from the train at more than *one place*, the identification of the tracks and place in Count Eleven should be read into the other two counts in the same complaint. There is no other averment of any means or ability on the part of the Respondent to control in any way what grew or remained near the Florida East Coast Railroad tracks or that the defendant knew of the presence of such tall canes at any time before this train movement on the Florida East Coast tracks. These averments fall far short of showing any legal duty on the part of the defendant to take any action whatever in reference to the alleged tall canes and likewise fail to show that Respondent failed to use reasonable care to provide deceased a reasonably safe place to work.

This count then charges only that his allegedly required signal would not have been visible to the engineer and he would have been in danger of being struck and scraped off the side of the gondola car had he undertaken to give a signal from the side of the car "as the said gondola car *passed* the place where said tall canes were then and there growing." There is no averment that he *must* have given the signal *at that particular point* and it must be inferred that the deceased could have given such signal in the allegedly contemplated way *after the car passed the place where the tall canes were growing*, or before reaching it. Clearly this is insufficient to show that the effect of the canes was to interfere with the deceased's alleged contemplated act and, in fact, shows that he himself made a voluntary choice of an alternate method without any necessity therefor.

The ultimate and essential charge in this count is that these canes "caused" deceased to climb over the front end of the car to reach the tank car ahead in order to give the signal and that the canes "thereby" caused him to place himself in a "place of much greater danger" than he would otherwise have been had he gone over the side of the car, and then simply that while there he fell. It is not alleged that any agent or employee of defendant instructed deceased to adopt this alternate route or method nor are any facts alleged to show him under any compulsion whatever to do so.

In this count there is a failure of the facts to show either any negligent breach of duty by the defendant in failing to use reasonable care to furnish deceased with a reasonably safe place to work and complete failure of the facts alleged to establish any proximate causation between any act or failure to act by the defendant, *whether negligent or not*, and the fall of deceased from the train.

The Complaint's averment that the alternate route or method adopted by deceased was a place of "much greater danger" is tantamount to an admission that the place or route

was a reasonably safe place or route for the performance of his duties and unattended by any causative negligence on the part of the respondent.[1]

Of this Count Ten the Supreme Court of Alabama in its opinion (R-26) said:

> "Although it is alleged that the different course of conduct followed by Reynolds was more dangerous than the course of conduct ordinarily followed, it is not alleged that it was not reasonably safe. Moreover, the allegation that it was more dangerous is comparative and a conclusion of the pleader. As we have pointed out, the causal connection between the negligence complained of and the injury sustained cannot be left to mere speculation and conjecture. No where in count 10 is it made to appear what caused Reynolds to fall between the cars. Climbing or going from one car to another on a moving freight train, in the performance of their duties, is not unusual for trainmen such as Reynolds was. And although dangerous, the carrier cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment which cannot be eliminated by the carrier's exercise of reasonable care. *Ellis v. Union Pacific R. R.*, 91 L. ed. 433."

Some danger inheres in all employment and if there are more jobs than one it necessarily follows that the performance of one job will entail more danger than the performance

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[1]Compare Mobile Light and R. Co. v. Therrell, 205 Ala. 553, 88 So. 667 where the Court said:

"The first count of the complaint is without averment as to the unsafety or inconvenience of the place at which Defendant's car stopped, and at which plaintiff was injured in the course of his disembarkation, except only that it "was dangerous for a person walking on crutches," and there is no averment that plaintiff was walking on crutches. Manifestly, there was no duty resting on defendant to make stops and invite disembarkations only at places which were safe for persons "walking on crutches." Construing the complaint more strongly against the pleader, the stated conclusion that the place was dangerous for persons "walking on crutches" must be taken as a negation of danger for persons normally conditioned, and hence there is a failure to show a breach of defendant's legal duty in the premises."

of another. Dangerous work must be performed and work must be done in dangerous places. It is not the fact that work is dangerous or that injury occurs that constitutes negligence or creates liability on the part of the employer. The danger must have been created directly and proximately by the negligence of the employer. The fact that it is normally a part of a trainman's, and the deceased's, job to pass from car to car as the train is in motion is of such common knowledge that it is freely admitted by Petitioner (Petitioner's Brief, p. 16). He had to do so to get to the gondola car on which he was just before he fell.

The hazards and danger inherent in the job of trainman are ones deceased assumed—it is only that hazard and danger caused in whole or in part by demonstrable negligence of the Respondent which he would not assume. *Ellis v. Union Pacific*, 27 NW 2d 921 (926), (opinion rendered after the opinion by this Court reported in 329 U.S. 649, 91 L. ed. 433).

Count Eleven (R. 5 to 7 inc.):

The essence of this count is simply that deceased fell while he was performing duties which another employee, who was present and doing nothing whatever, should have ordinarily been performing and as the whole basis of asserted liability merely alleges as a conclusion that, in undertaking to perform the duties which he alleges would ordinarily have been performed by the other employee, deceased *was caused to quit a much safer place to work and the performance of much safer duties.* There is here no averment whatever that any act, skilled or unskilled, incompetent or competnt, or in any way negligent, on the part of the other employee caused or contributed in any way to the deceased's fall from the train. Nor is there any averment that the defendant negligently employed Skelly or negligently retained him in its employ after knowledge of any alleged incompetency. It nowhere appears in this count, or any other count for that matter, *how* or

why Reynolds was actually caused to fall from this train—but simply that in the course of performing the job at hand he did fall.

The count does not aver that any agent or employee ordered or directed deceased to perform the duties which might ordinarily have been performed by Skelly or that there was any rule of the employer so requiring. The only operative averment is that "as the only other brakeman on said train" Reynolds "was required to undertake the performance of the duties of the said Skelly." In the absence of any other averments of facts showing a necessity for Reynolds so to do, this averment can only have one of two alternative meanings (a.) that *as a matter of law* under the other facts set out, it was his duty to assume the performance of Skelly's ordinarily expected duties. If so, then it certainly would not constitute, at the same time, *negligence* on the part of his employer—there would be no violation by the employer of any duty owed to Reynolds; or (b) that Reynolds' undertaking to perform those duties was wholly voluntary on his part, unattended by any order or direction from the Respondent.

It must be borne in mind that nowhere in this count is it claimed or contended that the place of work or the duties which supposedly Skelly would ordinarily be expected to perform were in any way rendered unsafe by reason of any negligence on the part of the Respondent.

What has been said above generally and concerning Count Ten applies in large measure to Count Eleven and the applicable authorities already cited will not be again referred to.

In a comparable situation, the Circuit Court of Appeals, Ninth Circuit, in *Deere v. Southern Pac. Co.*, 123 F.2d 438, said:

> "When failure to provide sufficient help results in injury to an employee, there exists a ground of negligence which is recognized under the Federal Employers'

Liability Act (*Chesapeake & Ohio Ry. Co. v. Winder*, 4 Cir., 23 F. 2d 794), but to permit recovery in such case it must be shown that such failure was the proximate cause of the accident. *Marshall v. Chicago, etc., R. Co.*, 131 Minn. 392, 155 N.W. 208; *Stunks v. Payne*, 184 N.C. 582, 114 S.E. 840. To recover plaintiff is required to prove not only that the railroad was negligent, but that the injury resulted proximately from that negligence. *Healey v. New York, O. & W. R. Co.*, 2 Cir., 79 F. 2d 542. Here, the plaintiff contends that the speeder was too heavy for decedent to handle properly. But if it be conceded, arguendo, that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of plaintiff's decedent. His death was not owing directly to the act of removing the speeder, but was due proximately to his failure to step aside from the path of the train, the approach of which was fully known to him, as is evidenced by the fact that he had begun to remove the speeder from the way of the train. He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances reasonable men must agree that the accident was not brought about through any failure to furnish sufficient help, and there is therefore no question for the jury on this point."

Even if the route, method or duties undertaken by Reynolds at the time were more hazardous, as argued by Petitioner, than Reynolds might otherwise have been engaged in, there are no averments of any compulsion upon him. If an employee has a choice of ways to do a thing in the course of his employment and he voluntarily chooses the more dangerous way, his employer is not liable for injury resulting if the risk of injury is obvious and such as a man of ordinary prudence would avoid, except when the employee is in an emergency without an opportunity of deliberation or if the hazard in the choice is not clear. *Burnett v. Northern Pac.*

Ry. (Mont.) 124 Pac. 2d 307. Here there was no emergency. Reynolds must be taken under these averments as a skilled brakeman or trainman; if there was any unusual danger about what he was doing it was obvious to him and there is absence of any averment of any compulsion upon him to make the choice which he did.

Of this Count Eleven, the Supreme Court of Alabama in its opinion (R. 27) said:

> "Count 11 is subject to the same criticism as is count 10. The casual connection between the negligence complained of and the injury sustained is not made to appear, but is left to speculation and conjecture only.
>
> "Conceding that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of Reynolds. It is not alleged that he was not free to handle his own movements, or that any superior's orders required him to pursue the course of conduct which he did pursue. It cannot be said that the omission to provide sufficient and competent help was the primary moving cause, which in the natural and probable sequence of events, and without the intervention of a new or independent cause, produced Reynolds' fall between the cars, and his death.—Authorities supra."

The inescapable intendment of this count is that had Skelly, the other employee, been doing the job exactly as did Reynolds and had fallen and died exactly as did Reynolds, there would have been no want of care and no liability on the part of the Respondent.

The controlling doctrine of the law does not permit a jury to speculate how an accident happened and then further speculate on what it was that the defendant did that was negligent and caused the accident. The continued building of inferences upon inferences is not countenanced. Inferences can only be properly drawn from probative facts themselves viewed in

the light of human experience. In whatever terms the doctrine may be variously expressed, the essential requirement is that mere speculation will not be allowed to do duty for probative facts. *Trust Company of Chicago v. Erie Railroad Company*, 165 F. 2d 806; *Galloway v. United States*, supra.

Count Twelve (R. 7 to 10 inc.):

By this count Petitioner simply combines Counts Ten and Eleven by inserting in Count Ten the principal averments of Count Eleven, by way of inducement in undertaking to set out the charge that in proceeding from one car to another Reynolds, the deceased, was allegedly doing the job Skelly, a fellow trainman, would ordinarily be expected to do, repeating the unsupported conclusion that the deceased was by the canes "caused to place himself in a place of much greater danger" after he had (apparently voluntarily) allegedly "quit a much safer place of work and the performance of much safer duties." It ends with the repetition of the conclusions averred in both Counts Ten and Eleven.

This count merely compounds the vice already inherent in the separate Counts Ten and Eleven, as already pointed out in the foregoing argument and authorities.

The Appellant seeks to draw a mantle of sufficiency over this prolix, insufficient and ineffective count by quoting from *Union Pacific v. Hadley*, 246 U.S. 330; 62 L.ed. 751; 38 S.Ct. 318.

Justice Holmes' remarks about the 'total being greater than the sum of the parts' were addressed to the *defendant's request to the trial court to address special interrogatories to the jury on various phases of the circumstances and which the trial court declined in proper exercise of discretion.* Now, of course, the Rules of Civil Procedure expressly contemplate special interrogatories to and findings by juries in District Courts. There could hardly have been any serious contention that running a train past block signal warnings when the

crew already knew in fact another train was close ahead was not negligence and the deceased's failure to further flag it was at best only contributory negligence, which was not then and is not now a defense. The provision of the statute which imposes liability if the injury "result in whole or in part from negligence of any of the employees" of the defendant makes necessary the removal of contributory negligence as a complete defense in the interest of consistency.

The Supreme Court of Alabama in its opinion (R. 27-28) aptly dealt with this further contention as to Count Twelve:

> "Count 12 is but a combination of counts 10 and 11. In support of count 12 appellant cites *Union Pacific R.R. v. Hadley*, 246 U.S. 330, 62 L. ed. 751, 3 S. C. 318, and *Blair v. Baltimore & Ohio R.R.*, 323 U.S. 600, 89 L. ed. 490, 65 S. C. 545. In the latter case, Mr. Justice Black, said: 'The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.' This principle has no application here. The defect in each count of the complaint is not in its failure to allege negligence, but failure to allege facts showing a causal connection between that negligence and the death of Reynolds. Count 12 is as defective in this regard as are counts 10 and 11."

Petitioner deliberately selected as the forum the state courts of the State of Alabama and deliberately chose the mode of stating and particularizing her complaint. Her case was fairly heard and the substantive doctrine was fairly applied by the courts in keeping with the state rules of practice and procedure. Petitioner is bound by the result.

CONCLUSION

Fundamentally the essence of the Complaint is simply that Petitioner's intestate met his death by falling from a train in the course of his employment in interstate commerce.

The Federal Employers Liability Act does not subject a railroad to that degree of liability imposed by a Workmen's Compensation law nor place the railroad in position of an insurer of its employees. If the railroad ought to bear the financial burden of every accident in the industry, the power to so prescribe is in Congress and not in the Courts. *Wolfe v. Henwood*, 162 F.2d 998 (1001); *Myers v. Reading Company*, 331 U.S. 477; 91 L. ed. 1615.

Standards of conduct and responsibility are essential to an orderly society. No standard has yet been devised by our law making bodies which perfectly insures recompense for every conceivable individual loss. The Federal Employer's Liability Act as deliberately written by the Congress is not an exception. This is fittingly illustrated as applied to the facts here by the language of the Circuit Court of Appeals, Third Circuit, in *Eckenrode v. Pennsylvania Railroad Co.*, 164 F. 2d. 996, (affirmed on certiorari Nov. 15, 1948, 93 L. ed. 64, Adv. op.) as follows:

> "Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there

is negligence when it does not exist. It does not exist in this case."

The action of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned Peyton D. Bibb, Attorney for the Respondent, hereby certify that a copy of the foregoing Brief and Argument was served on J. Kirkman Jackson, Esq., Attorney for Petitioner, on the 23rd day of December, 1948.

This the 23rd day of December, 1948.

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